Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-761

THE PHILADELPHIA HOUSING AUTHORITY,
Petitioner,

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, et al.,
Respondents.

[Additional Respondents listed inside cover]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ADDITIONAL RESPONDENTS.

HOUSING TASK FORCE OF THE URBAN COALITION,

BERNICE DEVINE,

ESTHER SIERRA MENDEZ,

JEAN THOMAS,

MABLE SMITH,

(Plaintiff-Appellees below)

CITY OF PHILADELPHIA,
FRANK RIZZO,
HILLEL LEVINSON,
JAMES H. J. TATE, and
FRED T. CORLETO,

MULTICON CONSTRUCTION CORP. and MULTICON PROPERTIES, INC.,

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

WHITMAN AREA IMPROVEMENT COUNCIL,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RUSSELL BYERS, and CARLA A. HILLS,

(Defendant-Appellants below)

[Addresses and special capacities listed in Appendix, pp. A86-A89]

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I. OPINIONS BELOW.

The Opinion of the District Court is reported at 425 F. Supp. 987 and is printed in the Appendix hereto, pp. A1-A82. The Opinion of the Court of Appeals is not yet officially reported but is printed in the Appendix hereto, pp. A86-A143.

II. JURISDICTION.

The Judgment of the Court of Appeals, of which review is sought, was entered on August 31, 1977 (Appendix at A144-A148. The Appendix is hereafter cited as "A —"). By Order dated September 26, 1977 (A149), the Court of Appeals denied the Petition of Appellees below (Respondents herein) for a panel rehearing. This Court has jurisdiction to review the judgment of the Court of Appeals upon Writ of Certiorari under 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED.

1. Whether a state agency may be held in violation of Section 804(a) of Title VIII of the Civil Rights Act of 1968, 42 U. S. C. § 3604(a), without a finding that the agency acted with discriminatory intent.

2. Whether a federal court may order a state agency, which has not been found to have committed a constitutional violation, affirmatively to build a particular housing project at a precise location in accordance with specific plans, when alternative remedies are available.

3. Whether a court may hold a state agency liable, under Title VIII of the Civil Rights Act of 1968, for the segregative effect of the termination of a proposed housing project, when there has been no proof and no finding by the trial court that the agency caused the termination.

4. Whether, in litigation in which the plaintiffs' equitable claims and a defendant's legal cross claims raise common issues of fact, the severance of the cross claims for trial after the non-jury trial of the equitable claims denies the defendant its constitutional right to a jury trial of the cross claims.

5. Whether, in a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, a court may disregard a representative plaintiff's retraction of testimony and invocation of the privilege against self-incrimination for perjury, when the individual was the only named plaintiff or class representative to testify and the only individual unequivocally to support the relief requested.

IV. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF CIVIL PROCEDURE INVOLVED.

1. United States Constitution.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to rules of common law.

2. Federal Statutes.

CIVIL RIGHTS ACT OF 1968, TITLE VIII, SECTION 804(a), 42 U. S. C. § 3604(a).

As made applicable by section 3603 of this title and except as exempted by section 3603(b) and 3607 of this title, it shall be unlawful—

(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a

dwelling to any person because of race, color, religion, sex, or national origin.

3. Federal Rules of Civil Procedure.

RULE 23.

SUBSECTIONS (a), (b)(2), (c)(2), and (c)(3).

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • •

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

• • •

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

• • •

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

RULE 38.

SUBSECTIONS (a), (b), AND (c).

JURY TRIAL OF RIGHT.

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the

other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

RULE 42(b).

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

V. STATEMENT OF THE CASE.

A. Factual Background.

This proceeding arises from a long history of controversy concerning proposals for a public housing project in an area of South Philadelphia known as Whitman Park. Both the District Court (A8-A32) and the Court of Appeals (A94-A109) have described the complex chronology of events leading to litigation.

Petitioner The Philadelphia Housing Authority ("PHA") is a local housing authority, created as an agency of the Commonwealth of Pennsylvania under the Pennsylvania Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. §§ 1541 *et seq.*, generally charged with the operation of public housing projects in the City of Philadelphia. In 1956, PHA began a series of hearings which, with other administrative and governmental proceedings, led to the choice of Whitman Park as the site for a proposed high-rise public housing project, to be called "Delaware Towers" (A8-A9, A97). Condemnation and acquisition of the land for the program began in 1959 (A9).

There soon developed substantial local concern over the prospect of high-rise public housing, and, in 1961, residents of the Whitman area formed a community organization called the "Whitman Area Improvement Council" ("WAIC") to oppose the project (A9). In view of the community opposition, and after further hearings and negotiation, the administrative and construction procedures for the project were changed to permit a low-rise "townhouse" type design (A11).[1]

Under the revised proposal, The Redevelopment Authority of Philadelphia ("RDA") was to acquire the Whit-

1. This change became possible under the so-called "Barrett Amendment", introduced by Representative William Barrett of South Philadelphia and adopted as Section 1007 of the Housing Act of 1964, P. L. 88-560, 78 Stat. 769.

man site for transfer to an approved developer under contracts (including an agreement with PHA) for construction of the project and conveyance back to PHA (A11). After development of a new site plan, sale of the property to RDA, and unsuccessful negotiations with one proposed contractor, the relevant agencies chose Multicon Construction Corp. and Multicon Properties, Inc. (collectively "Multicon") as the contractor to build the project (A11-A13).

In 1970, RDA conveyed the land to Multicon under appropriate contracts (A13-A14). A groundbreaking ceremony took place on December 16, 1970, and actual construction was scheduled to begin on March 23, 1971 (A15). Except for the building of a fence and some preliminary work, however, there was in fact no construction. From the commencement date, there followed picketing and demonstrations, administrative problems and various other disputes which led to a series of state court actions and the proceedings below (A15-A32).

In March, 1971, Multicon sued WAIC in the Court of Common Pleas of Philadelphia County to prevent interference with the project (*Multicon v. WAIC*, C. C. P., Phila. Cty., March Term, 1971, No. 4515), and shortly thereafter WAIC began an action against Multicon to stop construction (*WAIC v. Multicon*, C. C. P., Phila. Cty., July Term, 1971, No. 1187). Respondents brought the instant federal litigation in June, 1971, but the District Court stayed the proceedings pending the result of the state court cases (A3).

During the pendency of this litigation, the disputes, negotiations and administrative actions concerning the project continued (A15-A32). On April 28, 1972, RDA adopted a resolution authorizing action against Multicon upon PHA's representation of a default under the con-

tracts (A25-A26). PHA, however, made no such representation, and two months later RDA, by an additional resolution, itself declared Multicon in default (A26, A28, A31-A32).

At the same time, a third state court action began, with the City of Philadelphia bringing suit to stop the project and Multicon filing a substantial counterclaim for damages from interference with contractual relations (*City v. Multicon*, C. C. P., Phila. Cty., June Term, 1972, No. 3538) (A27, A29). This state court proceeding ended in December, 1972, by a settlement under which the City agreed to a compromise payment on Multicon's counterclaim (A32).

By the end of 1972, it appeared that the state court actions would not resolve the claims presented in the federal proceeding. The District Court, therefore, terminated the stay, and the parties proceeded with the litigation, leading to the decisions below (A3).

B. The Proceedings Below.

1. *Parties, Cross Claims, and Non-Jury Trial.*

The proceedings below began with a complaint, invoking the jurisdiction of the District Court under 28 U. S. C. §§ 1331 and 1343, against the Mayor and Managing Director of the City of Philadelphia and Multicon. The Court permitted WAIC to intervene as a party defendant, and Multicon joined PHA, RDA, and the United States Department of Housing and Urban Development ("HUD") as third party defendants. Upon respondents' motions, RDA, PHA, and HUD ultimately became principal defendants (A7-A8).

In May, 1975, the District Court certified the case as a class action, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of "all low income minority

persons residing in the City of Philadelphia who, by virtue of their race are unable to secure decent, safe, and sanitary housing, outside of areas of minority concentration and who would be eligible to reside in the Whitman Park Project" (A4).

With its Answer as a principal defendant, PHA filed a cross claim against Multicon demanding damages for breach of contract, and PHA timely demanded a trial by jury. Multicon responded with a counterclaim and cross claim for damages against PHA. Several months later, respondents moved to delete all claims for money damages, sever the trial of the cross claims and strike PHA's demand for a jury trial.

The District Court decided to allow the case first to proceed with a non-jury trial of the equitable claims. To this end, the Court granted the motions to dismiss the claims for damages, sever the cross claims and strike PHA's jury trial demand. While it did not enter a formal order as to the sequence of trials, the Court determined from the bench that the non-jury trial would proceed before the jury trial of the damage claims between PHA and Multicon (A137).

The non-jury trial began on October 7, 1975, included 57 days of testimony, and concluded on January 21, 1976. The jury trial of the cross claims has not yet been held.

2. *Post-Trial Proceedings Relating to Respondent Mrs. Jean Thomas.*

In late July, 1976, Respondent Jean Thomas, the only class representative and individual plaintiff to testify at trial, advised the District Court that she wished to change her testimony because portions of it had been untrue. After conferences with counsel, the Court met with Mrs. Thomas and scheduled a hearing on the matter at which time Mrs. Thomas would retain independent counsel.

At the hearing, Mrs. Thomas' attorney advised the Court that, because of possible self-incrimination that could arise from retraction of her testimony, Mrs. Thomas, on the advice of counsel, would exercise her constitutional privilege to remain silent. The following day, the District Court entered an order finding Mrs. Thomas entitled to invoke the privilege.

Shortly thereafter, PHA filed a motion to reopen or strike Mrs. Thomas' testimony. The District Court did not rule on the motion.

3. *The Decision of the District Court.*

On November 5, 1976, the District Court issued an 82 page Opinion, finding in favor of respondents on three legal theories, two of which, arising under Title VIII of the Civil Rights Act of 1968, applied to PHA (A1-A82).

The Court first determined that the affirmative duty imposed on HUD by Section 808(d)(5) of Title VIII, 42 U. S. C. § 3608(d)(5), also applied to state and local agencies and that the governmental defendants (PHA, RDA, The City of Philadelphia, and HUD) had failed to comply with this obligation, by not building the project (A47, A48-A66).

The District Court also held that a violation of Title VIII could arise from action having a segregative effect, without a finding of discriminatory intent. On this basis, the Court found the governmental defendants in violation of unspecified portions of Title VIII for having caused such an effect in "terminating" the project (A48, A66-A72).

On Respondents' statutory and constitutional claims of discriminatory intent, the Court's Opinion considered only the City of Philadelphia and WAIC and held only the City to have acted with improper racial motivation

(A48, A72-A75). The Court did not find any racially discriminatory intent, or any constitutional violation, on the part of PHA.

With respect to the remedy, the Opinion recognized the superiority of so-called "scattered site" public housing to conventional housing projects for achieving racial integration, but, for an unstated reason, the Court felt compelled to order the project's construction, stating:

> Although the Court is inclined to agree that "scattered site" housing may be more effective in accomplishing racial integration than a large public housing project, we are of the opinion that on the basis of this record the Court must order the building of the Whitman Park Townhouse Project as originally planned (A79).

Accordingly, the Court entered an Order (A83) directing the building of the project as originally planned, requiring PHA to submit a plan for the project's racial composition, enjoining interference with construction, and instructing PHA to submit plans for the tenanting of all public housing projects in Philadelphia to further integration.

With respect to Mrs. Jean Thomas' retraction of her testimony, the Opinion stated only that Mrs. Thomas had exercised her privilege to remain silent, and that her testimony was "unchanged" (A44). The Opinion made no reference to the controversy concerning PHA's demand for a jury trial.

4. *The Decision of the Court of Appeals.*

On August 31, 1977, the Court of Appeals entered an Opinion (A86-A143) and Judgment (A144-A148) affirming Paragraphs 1, 2, and 4 of the District Court's Order,

concerning the construction of the project, as to PHA and the other governmental defendants. The Court vacated Paragraph 3 of the Order, concerning the retenanting of all public housing projects in Philadelphia, as unwarranted and outside the scope of the litigation concerning Whitman Park.

In its discussion of Title VIII, the Court of Appeals reviewed the import of the portion of Section 804(a), 42 U. S. C. § 3604(a), proscribing the denial or making unavailable of a dwelling "because of race". It determined that a showing of segregative effect *prima facie* established a violation of this provision, without regard to discriminatory intent (A129-A135).[2] Quoting the District Court's statement concerning the "termination" of the project, the Court of Appeals found an unrebutted *prima facie* case of a Title VIII violation by PHA and the other governmental defendants (A135-A137). The Court affirmed the remedy requiring building of the project as "modest and conservative" (A136-A137).

The Opinion referred to the issues concerning Mrs. Jean Thomas and the jury trial of the cross claims only in footnotes and found neither sufficient for reversal of the District Court (A114, A137). With respect to Mrs. Thomas, the Opinion mentioned only respondents' standing to bring the action and the vigorous advocacy by their counsel (A114). While recognizing the importance of PHA's assertion of an unconstitutional denial of a trial by jury, the Court rejected the claim because it was not "persuaded that the essential elements of collateral estoppel have been met" (A137).

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2. Because of its holding concerning segregative effect, the Court of Appeals found it unnecessary to consider the District Court's extension of HUD's "affirmative duty" under Section 808 (d)(5) to state agencies such as PHA (A115, A128).

VI. REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. Review of the Decision Below by This Court Is Necessary to Resolve a Conflict Among the Circuits.

The decision of the Court of Appeals, as it relates to PHA, depends on the Court's holdings (1) that segregative effect, without regard to discriminatory intent, suffices to establish a violation of Section 804(a) of Title VIII of the Civil Rights Act of 1968, and (2) that an order affirmatively requiring a state agency to build a particular housing project at a specific location according to specific plans constitutes a permissible and appropriate remedy for such a statutory violation.

Both of these holdings, concerning important and far-reaching federal issues, are in direct conflict with the decisions of the Court of Appeals for the Second Circuit, and substantial conflict with decisions of the Courts of Appeals for the Sixth and Seventh Circuits.

In the Opinion below, the Court of Appeals states that its application of an "effect" standard to claims under Title VIII, without regard to discriminatory intent, "joins the ranks" of other circuits (A132). In fact, of the courts of appeals to consider this issue, only the Court of Appeals for the Eighth Circuit has fully concurred with this portion of the decision below. See *Smith v. Anchor Building Corporation*, 536 F. 2d 231 (8th Cir. 1976); *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied* 422 U. S. 1042 (1975). No federal court, including those in the Eighth Circuit, has yet imposed the extreme remedy, approved by the Court of Appeals in this case, of requiring a party affirmatively to build specific housing.

In *Boyd v. Lefrak Organization*, 509 F. 2d 1110 (2nd Cir. 1975), *cert. denied* 423 U. S. 896 (1975), the Court of Appeals for the Second Circuit, in direct conflict with the decision below, held that segregative effect alone could not establish a violation of Title VIII, including Section 804(a).[3]

With respect to remedies under Title VIII, *Boyd* confirmed that the Court of Appeals for the Second Circuit would not, in the absence of discriminatory intent, require the construction of housing. Citing the previous decisions in *Citizens Committee for Faraday Wood v. Lindsay*, 507 F. 2d 1065 (2d Cir. 1974), *cert. denied* 421 U. S. 948 (1975), and *Acevedo v. Nassau County*, 500 F. 2d 1078 (2d Cir. 1974), the Opinion in *Boyd* stated:

> [T]his Court will not impose even on the government an affirmative duty to construct low-income housing when the decision not to build is not racially motivated . . . 509 F. 2d at 1113.

Similarly, the Court of Appeals for the Sixth Circuit has, by necessary implication, rejected the type of relief imposed below as a remedy for a statutory violation based only on effect. In *Garrett v. City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974), the trial court had, on the basis of intentional discrimination, directed the construction of a certain number of housing units in a general geographic area (without specifying exact locations and plans as was done below). In considering the propriety of the remedy, the Court of Appeals held:

> The fundamental basis for the district court's disposition of this case lies in its finding of constitutional, not

3. A recent law review comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 *Harv. C. R.-C. L. L. Rev.* 128, 147-150 (1976), although arguing for a Title VIII "effect" standard, recognized the inescapable conflict on this issue between the Courts of Appeals for the Eighth and Second Circuits.

> statutory, violations by the defendants. Only deprivation of constitutional rights would justify the far-reaching remedial provisions of the court's orders. 503 F. 2d at 1247.

Plainly, the Court of Appeals in *Garrett* does not concur with the decision in this proceeding ordering the construction of a housing project solely on the basis of statutory violations.

Finally, the Opinion below refers to and relies on the decision, after remand from this Court, in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977) ("*Arlington Heights* II") as supporting the effect standard. *Arlington Heights* II, however, did not generally approve the effect concept for all cases. It rather found the standard potentially applicable to Title VIII claims, depending upon the circumstances of the case and four "critical factors"—including whether the plaintiff seeks to compel a defendant affirmatively to provide or build housing or "merely" to restrain from interference with housing. 558 F. 2d at 1290. Citing the Second Circuit decisions in *Acevedo v. Nassau County, supra*, and *Citizens Committee for Faraday Wood v. Lindsay, supra*, the *Arlington Heights* II Court found compelling reasons not to apply an effect standard to a Title VIII claim requesting the affirmative construction of housing units. 558 F. 2d at 1293.

In *Arlington Heights* II, the plaintiffs sought only restraint from interference. In this case, respondents sought, and the Courts below granted, an order directing that the defendants build specific housing. Under the facts of the two cases, the decision in *Arlington Heights* II presents more of a conflict than a concurrence with the decisions below.

B. This Case Presents the First Opportunity for This Court to Decide Whether Segregative Effect, Without Discriminatory Intent, Can Establish a Violation of Title VIII of the Civil Rights Act of 1968.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, — U. S. —, 50 L. Ed 2d 450 (1977), this Court, after reversing the application of an effect standard to constitutional claims, remanded for a determination of the case under Sections 804 and 817 of Title VIII, an issue the lower court had not considered. 50 L. Ed. 2d at 468. The decision thus left open the important question of whether, in the absence of discriminatory intent, segregative effect could establish a violation of the provisions of Title VIII of the Civil Rights Act of 1968 prohibiting the denial or making unavailable of a dwelling "because of race".

As discussed previously, this issue has given rise to a conflict among the circuits. Even the courts of appeals holding the effect standard applicable to Title VIII, however, including the Court of Appeals in this case, have found understandable difficulties in deciding that effect alone suffices to establish a violation of a statute which, by the use of the phrase "because of race" as its operative language, plainly suggests a requirement of intent. See A129; *Arlington Heights* II, 558 F. 2d at 1288.[4]

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4. The Opinion of the Court of Appeals states that, in debates on the statute, Senator Baker unsuccessfully tried to amend Title VIII to provide an intent standard for its violation (A131). In fact, Senator Baker's proposal was to extend the exemption for sales by an owner of a single family home, now in Section 803 (b)(1), 42 U. S. C. § 3603(b)(1), to include sales made through a broker, subject to the proviso that the owner could not use the exemption if he specified to the broker a preference or limitation based on race, color, religion, or national origin. 114 Cong. Rec. 5214-5215, 5218, 5219 (1968). The proposed amendment was unrelated to Section 804(a).

The only pronouncement by this Court on the subject strongly suggests that a showing of discriminatory intent is a prerequisite for a violation of Section 804(a). In *Warth v. Seldin*, 422 U. S. 490 (1975), this Court, in reviewing standing to raise certain housing claims, considered the import under Title VIII of a complaint challenging zoning practices claimed to have the "consequence of excluding members of racial or ethnic minority groups." 422 U. S. at 513 n. 21. Emphasizing the phrase "because of race" in Section 804(a), this Court found that the complaint did not allege a claim under that Section. The Opinion also stated that this Court intimated no view as to the result if the complaint had asserted "purposeful racial or ethnic discrimination." *Id.*

This portion of the *Warth* Opinion indicates that racial "consequence" will not establish a claim under Section 804(a) in the absence of a discriminatory purpose, and several lower courts have applied this concept in private, non-governmental Title VIII actions. See *e.g., Crumble v. Blumthal*, 549 F. 2d 462, 466 (7th Cir. 1977); *Haythe v. Decker Realty Co.*, 468 F. 2d 336, 338 (7th Cir. 1972); *Johnson v. Albritton*, 424 F. Supp. 456, 459 (M. D. La. 1977).[5]

The decision of the Court of Appeals below, applying the "effect" standard to Section 804(a) of Title VIII, reaches a conclusion contrary to that presented in the Opinion in *Warth v. Seldin, supra*, and the opinions of several lower courts. This case presents an opportunity for this Court firmly to establish the scope of Title VIII and the standard of proof necessary under Section 804(a).

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5. Decisions in private actions are of substantial significance to the development of Title VIII, since, as this Court has stated, "complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante v. Metropolitan Life Insurance Company*, 409 U. S. 205, 209 (1972).

C. The Decision Below Raises Important Issues as to the Remedial Powers of the Federal Courts.

The Court of Appeals decided that the statutory violations it had held to arise solely from a segregative effect justified an order requiring state agencies to build a housing project according to specific plans at a specific location. Although the Court's Opinion refers to the relief as "modest and conservative" (A136), the approval of this remedy is in conflict with decisions of the courts of appeals of other circuits and presents a substantial question as to the scope of equitable remedial powers of the federal courts.

Neither the Court of Appeals, the District Court, nor respondents (in a 177 page brief below) have referred to any precedent or authority for a remedy affirmatively directing the construction of specific housing units. Although the courts have rejected this type of relief in several cases, see *Boyd v. Lefrak Organizations, supra; Citizens Committee for Faraday Wood v. Lindsay, supra; Acevedo v. Nassau County, supra;* cf. *Arlington Heights* II, *supra,* no federal court, prior to the decisions below, had imposed such an order either on a governmental agency or a private party.

The issues raised by the remedy approved by the Court of Appeals are particularly compelling as applied to PHA in the circumstances of this case. The Courts below have, contrary to the mandates of this Court, assumed the governmental functions of PHA, a state agency,[6] and decided where and how Philadelphia's public housing will be built, without finding PHA to have

6. Although the Court of Appeals refers to PHA as the "City's" housing authority (A123) and a "municipal" agency (A127), PHA is, by the Pennsylvania Housing Authorities Law, an agency of the Commonwealth of Pennsylvania. 35 P. S. §§ 1550, 1544(a).

committed a constitutional violation or to have acted with discriminatory intent.

This Court has repeatedly held that such an intrusion into state or local government functions requires a constitutional violation by the governmental agency involved. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16, 28 (1971); *Milliken v. Bradley* (I), 418 U. S. 717, 738 (1974); *Rizzo v. Goode*, 423 U. S. 362, 377 (1976); *Hills v. Gautreaux*, 425 U. S. 284, 293 (1976); *Milliken v. Bradley*, (II), — U. S. — , 53 L. Ed. 2d 745, 757 (1977); *Dayton Board of Education v. Brinkman*, — U. S. — , 53 L. Ed. 2d 851, 862, 863 (1977). The holdings of the District Court and the Court of Appeals in this case against PHA are purely statutory, and PHA has not been found to have violated the Constitution.[7]

This Court has also made clear that a federal court must recognize and exercise special delicacy and restraint in the use of its equitable powers in connection with the activities and functions of state and local agencies. *Rizzo v. Goode, supra.* See also *Milliken v. Bradley* (II), — U. S. —, 53 L. Ed. 2d 745, 756 (1977); *Mayor v. Educational Equality League*, 415 U. S. 605, 615 (1974); *O'Shea v. Littleton*, 414 U. S. 488, 500 (1974). Although this concept does not easily lend itself to precise rules and standards, PHA submits that, in a case involving the extreme remedy of a mandatory injunction to build housing, issues of federalism at least require that substantial consideration be given to the availability of reasonable alternatives and the actual need for the relief ordered.

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7. The only governmental defendant that the Courts below found to have violated the Constitution, the City of Philadelphia, is also the only governmental defendant that would not have an active role in carrying out the planning, construction, and operation of the Whitman Park project.

Both of these factors confirm the impropriety of the remedy of requiring the building of the Whitman Park project. The District Court expressly recognized that so-called "scattered site" housing presented not only a reasonable, but a preferable, alternative to the project (A79).[8] Notwithstanding this conclusion, however, the District Court, without explanation, decided to order the project's construction.[9]

Similarly, there has been no reasonable showing of the need or desire for the use of the resources of the governmental agencies in this case, including PHA, to build this particular housing project. There has been substantial opposition to the project from the surrounding community, local government, and other state and local agencies. During 57 days of trial, only one person, Mrs. Jean Thomas, testified to an unequivocal desire to live in the project (and thus to have it built), and, as discussed below, Mrs. Thomas subsequently retracted her testimony. There is thus no credible evidence that anyone, including anyone eligible for public housing, wants the project built.

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8. The "scattered site" program involves the rehabilitation and use of existing structures to provide public housing tenants with individual dwelling units throughout a community, rather than a concentration of public housing in a single project. Unlike the remedy approved below, relief based on scattered site housing would not require an order for construction of a specific project and would obviate the need for the courts to assume the function of state and local agencies to decide where and how to build housing.

9. In *Arlington Heights* II (a case concerned with restraining interference with housing, not an affirmative order to build), the Court, after finding a violation of Title VIII, remanded the case for consideration of a number of matters, including the availability of alternative locations for the housing in question. 558 F. 2d at 1294-1296. The same result in this case would have required a reversal of the District Court, since appropriate, and preferable, alternatives to the Court's Order to build the project are available.

D. The Decision Below Severing Legal Cross Claims for Jury Trial After the Non-Jury Trial of Equitable Claims Raises Substantial Issues Concerning the Constitutional Right to Trial by Jury.

With its Answer as a principal defendant, PHA filed a cross claim against Multicon, the project developer, for money damages for breach of contract in failing to build the project—a claim at law giving rise to a constitutional right to a trial by jury.[10] U. S. Const., Amend. VII; *Curtis v. Loether*, 415 U. S. 189, 195-196 (1974); *Ross v. Bernhard*, 396 U. S. 531, 533 (1970). PHA timely demanded a jury trial, applicable to all issues including cross claims. F. R. Civ. P., Rules 38(b), 38(c).

The District Court prevented the initial determination by a jury of factual issues common to the equitable claims and legal cross claim, by severing the cross claim for trial after the non-jury trial of equitable issues. The Court of Appeals approved this procedure solely because it was "not persuaded that the essential elements of collateral estoppel have been met." (A137). PHA submits that the decisions of this Court do not permit circumvention of the constitutional right to a trial by jury on the basis of the formalities of doctrines such as collateral estoppel.

A trial court cannot constitutionally deny or curtail the right to a jury trial by the severance and prior trial of equitable claims, except to prevent irreparable harm in the most imperative circumstances. *Beacon Theatres v. Westover*, 359 U. S. 500 (1959); *Dairy Queen v. Wood*, 369 U. S. 469 (1962).[11] As Mr. Justice Black stated in

10. Multicon also filed a cross claim and counterclaim against PHA, demanding money damages for breach of a settlement agreement.

11. In *Beacon Theatres*, this Court stated that, in view of the flexible procedures of the Federal Rules of Civil Procedure, it could not foresee the imperative circumstances that might justify

the Opinion in *Beacon Theatres*, citing *Dimick v. Schiedt*, 293 U. S. 474, 486 (1935):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. 359 U. S. at 501.

The application of such a fundamental constitutional doctrine does not depend upon the technical prerequisites of collateral estoppel.[12] Both this Court and the courts of appeals have recognized the criterion for consideration of the propriety of a prior non-jury trial of equitable claims to be whether the litigation raises issues of fact common to the legal and equitable claims of the case. *Dairy Queen v. Wood, supra; Lee Pharmaceuticals v. Mishler*, 526 F. 2d 1115, 1117 (2d Cir. 1975); *Eli Lilly & Company v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1107 (5th Cir. 1972). In any such case, all claims must be tried in a single jury trial, or the legal claims tried before a jury *prior* to the trial of the equitable claims.

Resolution of respondents' equitable claims and PHA's cross claims in this case necessarily requires deter-

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11. (Cont'd.)
this exception. 350 U. S. at 510-511. In the proceedings below, the decisions relating to the jury and non-jury trials did not involve any suggestion of irreparable harm or "imperative" circumstances, and respondents have not presented any contention to the contrary.

12. Although possible collateral estoppel is not determinative of the jury trial issue, it is likely that the doctrine would apply to the trial of the cross claims. The "termination", or non-construction, of the project, which will be the principal issue on the breach of contract claims, was a major controverted issue in the proceedings below (in which PHA and Multicon were adverse parties) on which the District Court made numerous findings of fact. See *Sea-Land Services v. Gaudet*, 414 U. S. 573, 593 (1974); *Cromwell v. County of Sac*, 94 U. S. 351, 353 (1877).

mination of common issues of fact. Respondents assert liability under Title VIII against PHA and the other governmental defendants for the effect of not building the Whitman Project. PHA's cross claim alleges contract liability for damages on the part of Multicon for failure to build. No factual decision on either claim is possible without findings as to the party responsible for non-construction.

The District Court in fact made such findings and, in so doing, severely curtailed, or made effectively impossible, a jury trial of PHA's cross claim. The District Court's Opinion contains a 24 page exposition of findings of fact with extensive references to Multicon and the events leading to the non-construction of the project (A8-A32), and the Court of Appeals substantially confirmed that presentation (A94-A109). Because of these decisions, made without a jury, PHA's cross claims face the complete defense of impossibility of performance in that the courts have already decided that the governmental defendants in this case, not Multicon, terminated the project and prevented Multicon from fulfilling its contractual obligations. See *e.g. Restatement, Contracts* §§ 454-457.

PHA submits that such a result, based entirely on the formalities of collateral estoppel, does not comport with the mandate of the seventh amendment and should be reviewed by this Court.[13]

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13. In reaching its decision on this issue, the Court of Appeals relied on *Moore v. Townsend*, 525 F. 2d 482 (7th Cir. 1975). In *Moore*, however, the decision permitting the severance of cross claims for a later trial was based not on considerations of collateral estoppel, but simply on the fact that "none of the questions involved" in the cross claims were involved in the equitable claims, and that "none had been determined", 525 F. 2d at 486, a situation certainly not present in this case.

E. The Circumstances Relating to the Post-Trial Disclosures of Mrs. Jean Thomas Raise Important Questions Concerning the Implications of the Invocation of the Privilege Against Self-Incrimination in a Civil Class Action.

Approximately five months after trial, Mrs. Jean Thomas, the only individual plaintiff and the only class representative to testify at trial, advised the District Court that portions of her testimony had been untrue. After several conferences, Mrs. Thomas, on the advice of new and independent counsel, invoked her privilege against self-incrimination and refused to say anything further about her disclosure or her prior testimony.

The District Court's Opinion made no reference to these developments, except to state that because of Mrs. Thomas' silence under her fifth amendment privilege her testimony was "unchanged" (A44).[14] The Court of Appeals did not question this conclusion and referred to the matter only briefly in the context of standing and the vigorous prosecution of the action by respondents' counsel (A114). PHA submits that the issues raised by Mrs. Thomas' actions are of substantially more importance and present far-reaching questions concerning the use of the fifth amendment privilege in civil cases.

First, Mrs. Thomas' disclosure and subsequent silence did not leave her testimony "unchanged". Although the invocation of the privilege against self-incrimination cannot establish an inference of guilt in a criminal case, *Griffin v. California*, 380 U. S. 609 (1965), a failure or refusal to speak in a civil proceeding does give rise to an inference

14. Shortly after the hearing concerning Mrs. Thomas' disclosures, PHA filed a motion to strike or reopen testimony, and again raised the issue in a motion for a new trial. The District Court denied the motion for a new trial without comment (A84-A85) and did not rule on the motion to strike or reopen testimony.

that the testimony, if given, would have been adverse to the witness. *Baxter v. Palmigiano,* 425 U. S. 308, 319 (1976).[15] Since, as all parties have recognized, Mrs. Thomas invoked her privilege to avoid self-incrimination for perjury, her silence established an inference that she would have contradicted her previous testimony under oath, and that her testimony at trial was untrue.

The significance of this inferred perjury to the proceedings below is substantial.[16] At trial, Mrs. Thomas expressed her desire to live in the Whitman Park Project (and thus to have it built), and she was the only witness unequivocally so to testify. With her testimony inferred to have been false, there is no credible evidence supporting any need or desire for the project's construction. The importance of such circumstances to a case involving a mandatory injunction requiring a state agency to build the project cannot be dismissed solely by reference to standing and the vigorous advocacy of counsel.

In addition, this litigation proceeded as a class action, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of thousands of persons, with Mrs. Thomas as a named class representative and the only such

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15. Both this Court and the lower federal courts have confirmed and applied such an adverse inference under circumstances involving consequences to the witness far more serious than any at issue here. See *Baxter v. Palmigiano, supra* (prison discipline); *Brown v. United States,* 356 U. S. 148 (1958) (contempt); *Chavez-Raya v. Immigration and Naturalization Service,* 519 F. 2d 397 (7th Cir. 1975) (deportation); *N. Sims Organ & Co. v. Securities and Exchange Commission,* 293 F. 2d 78 (2d Cir. 1961), *cert. denied* 368 U. S. 968 (1962) (license revocation).

16. This Court has recognized the importance in civil actions of inferences from silence and found that a prohibition of an adverse inference "derogates rather than improves the chances for accurate decisions". *Baxter v. Palmigiano, supra* at 319. As Mr. Justice Brandeis stated in *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 153-154 (1923), "Silence is often evidence of the most persuasive character."

representative to testify at trial. Rule 23(a)(4) requires that, as a class representative, Mrs. Thomas "fairly and adequately protect the interests of the class". Because of the binding effect of class action adjudications, F. R. Civ. P., Rule 23(c)(3), fair and adequate representation is not only a prerequisite of the Rule, but a constitutional mandate of due process. *Hansberry v. Lee*, 311 U. S. 32 (1940). See also *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F. 2d 340, 346 (D. C. Cir. 1976), *cert. denied*, — U. S. —, 97 S. Ct. 2674 (1977).[17]

At a minimum, adequate class representation requires that the representative's interest coincide and not conflict with the interests of the class, *Sosna v. Iowa*, 419 U. S. 393, 403 (1975). The post-trial developments relating to Mrs. Thomas raise substantial questions concerning her compliance with this standard. The issue is not, as the Court of Appeals suggested, counsel's vigor in supporting the position Mrs. Thomas asserted at trial, but whether the presentation and advocacy of that position on the basis of testimony now inferred to be false properly represented a class which is conclusively bound by the results of the representation.

Stated differently, the inference arising from Mrs. Thomas' post-trial disclosure and subsequent invocation of her fifth amendment privilege raises the question of whether, in a federal class action, perjury is "fair and adequate" representation.

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17. This is particularly important in a class action under Rule 23(b)(2), in which the absent class members are conclusively bound by the result, but are not entitled to any notice of the proceedings and do not have an opportunity, available in actions under Rule 23(b)(3), to "opt out" of the litigation. F. R. Civ. P., Rules 23(c)(2), 23(c)(3). See *Wetzel v. Liberty Mutual Insurance Company*, 508 F. 2d 239 (3d Cir. 1975), *cert. denied*, 421 U. S. 963 (1976); 3B *Moore's Federal Practice* ¶ 23.60 at 23-1202.

VII. CONCLUSION.

For the foregoing reasons, Petitioner The Philadelphia Housing Authority respectfully submits that this Petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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